HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 956 OF 2002.

Vasant Kisan Dende,
Age: 40 years, Occu: Labourer,
R/o: Azad Chowk, Koregaon,
Tal: Koregaon, District - Satara. ..Appellant.

Versus.

The State of Maharashtra. ..Respondent.

Mr. H. S. Venegavkar for the appellant.
Mrs. M. M. Deshmukh, A.P.P. for the State.

CORAM: S. B. MHASE &
SMT. NISHITA MHATRE, JJ.

DATE: FEBRUARY 9, 2007.

ORAL JUDGMETN (Per S.B.MHASE,J.):

1. This appeal is directed against the judgment and order passed by the 6th Additional Sessions Judge, Satara on 31st July 2003 in Sessions Case No. 4 of 2002 wherein the accused - appellant is convicted for the offence punishable under section 302 of the IPC and sentenced to suffer life imprisonment and to pay a fine of Rs.500/- in default simple imprisonment for three months and he is also convicted for an offence punishable under section 498-A of the IPC and sentenced to suffer R.I. for 3 years and to pay a fine of Rs.500/-, in default S.I. for three months.

2. The brief facts of the case are as under:

. Deceased - Rukmini is the wife of the appellant - accused. They got married 30-35 years back. Out of the wedlock they are having a daughter and two sons. The daughter is already married. The accused - appellant is working in MAFCO. According to the prosecution, the accused was suspicious about the character of deceased - Rukmini for many years and used to have quarrel with her. On the day of the incident, namely, on 15.10.2001, at about 2.30 p.m. the accused - appellant came under the influence of liquor, had a food and started quarreling with the deceased - Rukmini, at that time accused poured kerosene on the person of the deceased - Rukmini stating that she should not leave more and should die and set her on fire by igniting the match box. The deceased - Rukmini came out of the house making hue and cry, at that time the neighbours and the accused by putting the quilt on her person extinguished fire. Thereafter the relatives of the deceased - Rukmini were called and deceased - Rukmini was admitted in the Civil Hospital, Satara, at about 9.00 p.m. on 15.10.2001. While, the deceased Rukmini was in hospital, on the basis of M.L.C.Report, PW-9 Sayaji Shelar, PSI. recorded statement Exhibit-14 at about 11.25 p.m. on 15.10.2001, which was treated to be a dying declaration after the

death of Rukmini. On the basis of this statement, initially on 16.10.2001, the offence under sections 498-A and 307 of IPC were registered at Koregaon Police Station. In the night in between 15.10.2001 and 16.10.2001, another statement of the deceased - Rukmini was recorded by PW-6 Vasant Phadatare, Executive Magistrate which is at Exhibit-15 (dying declaration). Since the offence was registered on 16.10.2001, the spot panchnama Exhibit -25 was prepared by Pw7 in the presence of the panch witnesses PW-3 & PW-4. The accused was also arrested on 16.10.2001 and since he had injuries on his person, he was examined by PW-8 Dr. Maruti Kambale in order to ascertain whether accused is in a fit condition to be put into police custody remand. While investigation was going on the wife of the accused expired on 23.10.2001 at about 9.35 p.m., and therefore subsequently offence under section 302 was added. The Inquest Panchnama Exhibit-6 was prepared and thereafter the post mortem was carried out. Post mortem report Exhibit 8 has been proved by Pw.2 (Umesh Patil). After recording of certain other statements and obtaining the Chemical Analyser’s report Exhibit-30, the charge sheet was filed by the police. After the trial the accused is convicted as stated above.

3. Before entering into the merits of the matter,

we would like to mention that PW-1 - Suresh Mohite and PW-3 & PW-4 (Panch witnesses) had turned hostile and they have not supported the prosecution case. Therefore, the spot panchnama (Exhibit-25) and the recovery of the articles which was sent to Chemical Analyser's examination have been proved by Pw-7 (Dnyanoba Ranjane, P.I.).

4. Learned counsel for the appellant submitted that there is no evidence for conviction of the appellant under section 498-A, because the only evidence of Pw-1 which could have been considered for the offence under section 498-A is not available, since the said witness has turned hostile. Learned counsel further submitted that the statement of the deceased which is pertaining to the cause of death of Rukmini cannot be considered for the purpose of holding the accused - appellant guilty of offence punishable under section 498-A of IPC. Learned counsel further submitted that the finding recorded by the trial court about section 498-A is not sustainable in law. So far as the finding of the trial court on the point of section 302 is considered, he submitted that the said finding is not just and proper. According to him, the dying declarations recorded by Pw-9 Sayaji Shelar, PSI and PW-6 Vasantrao, the Executive Magistrate are in variance, therefore, on the basis of such dying

declarations it is unsafe to convict the accused - appellant for an offence punishable under section 302, more specifically in the absence of corroborative evidence. In the alternative, he submitted that, the evidence shows that hands of the accused were equally burned and both the dying declarations show that it is the accused - appellant who had tried to extinguish the fire. He submitted that therefore even if he had initially put Rukmini on fire, yet since there was no intention to commit murder the conviction of the appellant - accused under section 302 is not sustainable in law. He submitted that under these circumstances, taking into consideration the mitigating circumstances the accused should have been convicted for an offence of culpable homicide not amounting to murder and should have been sentenced under section 304-II of the IPC.

5. Mrs. M.M. Deshmukh, learned APP for the State vehemently opposed the submissions made by the learned counsel for the appellant. It is submitted by the learned APP that the offence under section 498-A, IPC has been established, and equally the offence under section 302, IPC is also established. Learned APP - Mrs. Deshmukh submitted that both the dying declarations are cogent and consistent and have been immediately recorded by the prosecution witnesses and therefore the

conviction, has been properly rendered by the Sessions Judge. Learned APP also vehemently opposed the alternate submission made by the learned counsel for the appellant to give a benefit of section 304-II of the IPC to the accused.

6. In order to prove the offence under section 498-A, IPC it is a fact that the prosecution has examined PW-1 Suresh Mohite, however, said Suresh Mohite has not supported the prosecution. The portion marked "ABC" has been proved in the statement of PW-7, Investigating Officer at Exhibits- 26, 27 & 38. However, since it is a contradiction, the said portion cannot be read into evidence. On the contrary, it can be inferred that the witness is not disclosing the truth and he is not a reliable witness. And, if the witness is not reliable it is not possible to accept the testimony of this witness to prove the offence under section 498-A of the IPC. We further find that certain observations regarding ill-treatment which are reflected in Exhibits 14 & 15 recorded by PW-9 and PW-6 cannot be read into evidence so as to infer the guilt of the accused under section 498-A, IPC and therefore, we are of the opinion that the findings recorded by the Sessions Judge as against the appellant that the appellant is guilty of the offence punishable under section 498-A is not sustainable in law.

We accept the submission of the learned counsel for the appellant to that effect.

7. Now, coming to the conviction of the accused for offence punishable under section 302, IPC we are required to find out whether the statements recorded by PW-9 and PW-6, i.e., Exhibits 14 & 15 respectively, are reliable or not. It is to be noted that PW-9 has recorded the statement immediately after the admission of the deceased - Rukmini in the hospital at 11.25 p.m. Another statement was recorded by the executive magistrate thereafter, at about 12.45 to 1.15 a.m.. Both these statements were recorded in the presence of PW-2 (Dr. Umesh Patil). Dr. Umesh Patil has certified that at the time of recording of both these statements patient was in a fit condition, conscious and well-oriented to give statement. We have gone through the cross examination of these witnesses and nothing has been transpired which will impeach the testimonies of these witnesses as available from the examination-in-chief. Therefore, we record our findings that the statements exhibits 14 & 15 (dying declarations) are true, genuine and trustworthy. We also find that the testimonies of Pw-2, PW-6 & Pw-9 are trustworthy and beyond doubt. We accept the said evidence led by the prosecution.

8. Learned counsel tried to invite our attention to the following portions from Exhibits-14 & Exhibits 15.

Portion from Exhibit-14:

> "Today, on 15.10.2001 at about 2.30 p.m. my husband came drinking the liquor, he took the food and started quarrel with me. He thereafter took the kerosene can from the house poured it on my person, and stated that you should not now live and die, ignited the match box and set my clothes on fire. My clothes were ablaze. I made a hue and cry and came out of the house. My neighbours and my husband Vasant (accused) placed a quilt on my person and extinguished fire"

Portion from Exhibit 15 is as follows:

> "Today on 15.10.2001 being Monday it was holiday to the company and so he was at home. Today we returned to our house after visiting daughter at Shahupuri. (I) cooked. At that time, husband had drunken liquor. I was being beaten. (He was) saying that you die now. He

then poured kerosene from Rockel can on my person and set the saree on fire. My clothes burned. I came out making the hue and cry. While I was burning he placed quilt on my person and extinguished fire and brought me in the house."

. Relying upon these statements, learned counsel for the appellant submitted that these statements are at variance, and therefore, this evidence is not reliable and the statements of the deceased cannot be accepted to hold the accused guilty for an offence under section 302 IPC. We are not in agreement with the learned counsel for the appellant. What we find is that in a later statement only an additional information, that prior to 1 O'clock the deceased and accused were at the house of their daughter, has been given. But incident has taken place at about 2.30 p.m., that is after they had returned from the house of their daughter. Therefore, in Exhibit-15 it is specifically stated that after the return, the deceased prepared food and at that time the accused was under the influence of liquor and was quarrelling and beating the deceased; he also stated that the deceased should now die and thereafter poured kerosene and set her on fire, and when the deceased came out of the house making hue and cry, it is the accused

who has put the quilt on the person of the accused and extinguished the fire. If we carefully read these statements we find that both these statements are consistent and cogent and there is no discrepancy in both these statements. Under these circumstances, we do not find any force in the submission of the learned counsel for the appellant that the statements are at variance, and therefore benefit should be given to the accused. Said submission of the learned counsel is rejected.

9. It is to be noted that it is the case of the accused - appellant that the incident has taken place because of the stove, the saree picking up fire from stove. However, we do not find any support for this defence version anywhere in the evidence. Said defence is improbable and a false defence tried to be developed by the appellant.

10. Taking into consideration both dying declarations and the evidence of Dr. Umesh along with Exhibit-8 Post Mortem Report and Exhibit-6 (Inquest Panchnama) we can safely infer that the death of the deceased - Rukmini was homicidal one and was not an accidental one as tried to be made by the learned counsel for the appellant. We also record our finding that it is the accused - appellant who is responsible for the death

of deceased - Rukmini.

11. It is a fact on record that the accused was having burn injuries to his hand as is reflected from the statement of Pw-8, Dr.Maruti Kamble and certificate issued at Exhibit-33. It is further admitted by Pw-7, PI that when the accused was arrested he had injuries on his hand. Accused was arrested on 16.10.2001, i.e., immediately after the incident. It is further reflected from the dying declaration Exhibits-14 & 15 consistently that after the deceased was set on fire and deceased had come out of the house making hue and cry, it is the accused - appellant who had tried to extinguish the fire by putting the quilt on the person of the deceased and actually had extinguished the fire and brought the deceased in house. Taking into consideration this evidence and circumstances, we find that the accused may not be having an intention to kill his wife - Rukmini and/or it is equally possible that having seen Rukmini on ablaze he changed his mind, realising what a serious act he is doing and therefore he had come forward to extinguish the fire and therefore had tried to put a quilt on the person of Rukmini. Therefore, Rukmini had only 59% burn injuries. What we find is that this is a mitigating circumstance in favour of the accused. Therefore, we consider that the act was not done with an

intention to commit the murder. But, no doubt it was an act with the knowledge that the death may be caused. Therefore, we find that the offence in the present matter is not of 302, but it is a culpable homicide not amounting to murder punishable under section 304-II of the IPC. Therefore, we find that as a punishment for the said offence the sentence for a period of seven years will be appropriate in the facts and circumstances of the case.

11. Therefore, we pass the following order.

(1) Appeal is partly allowed.

(2) The conviction and sentence of the appellant so far as Section 498-A of the IPC is concerned, is quashed and set aside. The appellant is acquitted of the offence punishable under section 498-A of the IPC. The fine of Rs.500/-, if paid by the appellant on account of section 498-A of the IPC, may be returned to the appellant.

(3) So far as conviction of the appellant for an offence punishable under section 302 and sentence of life imprisonment is concerned, we

hereby set aside the said conviction and sentence and, in stead, we hold the appellant guilty of an offence of culpable homicide not amounting to murder punishable under section 304-II of the IPC and sentence him to suffer R.I. for 7 years and to pay fine of Rs.500/- in default S.I. for three months.

(4) With these modifications the appeal is disposed of.

(SMT. NISHITA MHATRE, J.) **(S.B.MHASE, J.)**